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IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1957

NO. 743

NEVIL C. WITHROW COMPANY, *Petitioner*
v.
W. R. GRIMSHAW COMPANY and NATIONAL SURETY COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

In compliance wth rule 23(g), it may be stated that jurisdiction in the court of first instance resulted from diversity of citizenship with the amount in controversy in excess of $3,000.00.

Statement

September 12, 1951, respondent, W. R. Grimshaw Company, herein called Grimshaw, became the general contractor for construction of a six story medical center in Little Rock, Arkansas (plaintiff's Exhibit 16, R. 113). Respondent, National Surety Company, was surety upon its bond.

September 26, 1951, Grimshaw gave a written sub-contract to the petitioner, Nevil C. Withrow Company, herein called Withrow, for all equipment, labor, material, etc.

for performance of that part of the principal contract described in specifications M-1 through M-5 (plaintiff's Exhibit B. R. 9). For brevity this will be referred to as the original September contract.

April 8, 1952 the owners gave Grimshaw a change order directing Grimshaw to "construct in part a seventh floor" addition to the Medical Center (plaintiff's Exhibit 17 R. 129).

June 8, 1952 Grimshaw gave Withrow a written subcontract for performance of the work described in specifications M-1 through M-5 as to the seventh floor (plaintiff's Exhibit C, R. 13). This will be referred to as the 7th floor contract.

From March 18, 1953 to July 6, 1953 there was a vigorous dispute and interchange of correspondence between the parties (R. 48 to 66). Withrow contended that Sections M-1 to M-5 of the prime contract, being the work subcontracted to Withrow, did not require Withrow to furnish or install the window *sills* for the countless aluminum windows required in Section M. With equal vigor Grimshaw insisted that the sub-contract did require Withrow to furnish and install the sills. The dispute was settled by Withrow's letter of July 2, 1953 (R. 64) and Grimshaw's acceptance thereof on July 6, 1953 (R. 65), in which Withrow agreed to furnish the exterior and interior window sills which had been in dispute, and Grimshaw authorized Withrow "under these conditions" to proceed with the execution of Withrow's contract. For brevity we shall call this the July agreement. It was reached before Withrow had done any construction on the site.

Without any further claim that the sills were not included in his sub-contract, Withrow then performed. In accordance with the July agreement he duly installed the windows, including the window sills where required by the "applicable drawings." He submitted his monthly estimates (R. 91 to 105) which, less the agreed retention, were duly paid (R. 106).

Withrow made no further claim for the window sills as a separate item until after the completion of the building in August, 1955. Then for the first time since the July agreement Withrow claimed he should be paid extra for "furnishing and installing exterior sills and interior sills" (plaintiff's Exhibit 14 R. 71), and refused to accept the retention fund in full settlement (R. 159). Withrow sued (Complaint R. 1 and amendment R. 17) for the retention fund and for furnishing window sills as extras. (The retention fund has since been paid and is not involved at this time. R. 28). Grimshaw pleaded (R. 18 and Amendment R. 22) that the original September sub-contract required Withrow to furnish the sills, and additionally pleaded the July agreement in bar to any recovery under the September contract; that the July agreement was a waiver, and an estoppel had resulted through the performance under the July agreement. Withrow filed a reply (R. 24) alleging the July agreement had been obtained through duress.

From an adverse verdict (R. 26) and judgment thereon (R. 27) the defendants appealed to the Court of Appeals for the Eighth Circuit (R. 175). Oral argument was had

(September 6, 1957) before appellants' time to file reply brief had expired. During the argument the Court of Appeals allowed appellants 10 days time for filing reply brief and gave Withrow the right to file answer thereto "if new questions are raised in the reply brief" (Appendix A, No. 1). Withrow did not file any answer or supplemental brief. The Court of Appeals thereafter held that the motion of the orginal defendants for directed verdict should have been sustained and reversed the judgment (248 F. 2d 896. Opinion, Appendix B to petition for certiorari).

Withrow thereupon filed petition for rehearing which the Court of Appeals denied November 15, 1957 (Appendix 2).

ARGUMENT

Summary. The petition for certiorari should be denied.

First. Because the question presented is on an alleged error of law of private concern only and is not within the purview of Rule 19.

Second. Because the question presented is moot. The Court of Appeals considered two independent grounds and decided both adversely to the petitioner. Only one of these issues is attacked in the petition for certiorari. If the entire part of the decision below pertaining to the issues complained of should be regarded as erroneous or as obiter dictum, the decision below would still stand because of the findings and conclusions of the Court of Appeals on the other issue.

Third. Because there is no ambiguity in the contract itself and no ambiguity is shown through extraneous matters such as the 7th floor contract. All questions of ambiguities, latent, patent and extraneous, were orally argued and petitioner was given and waived, the right to file a supplemental brief on the very matters complained of to this Court.

I. The question presented is not within the purview of Rule 19 of this Court.

A. ALLEGED BASIS FOR CERTIORARI. No question of public concern appears in the pending petition. To bring the matter within the purview of Rule 19, petitioner asserts as his sole ground that the decision of the Court of Appeals conflicts with decisions of the Arkansas Supreme Court.[1] Petitioner's complaint might be stated as follows:

1. The original contract between the parties was ambiguous because it employed the word "sill."[2]

No Arkansas decision is cited in support of this contention. Petitioner submits the point on argument alone.

2. Under Arkansas law, where a contract is ambiguous its interpretation must be left to the jury.[3]

3. Therefore, the Court of Appeals' finding that the contract was not ambiguous conflicts with Arkansas law.

The mere statement of this syllogism shows that the conclusion does not follow from the premises.

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1. "This petitioner seeks to come to this Court for the reason that the contract between the parties was ambiguous under the decisions of the Supreme Court of Arkansas. The Court of appeals has reached a result in square conflict with decisions of the Arkansas Supreme Court; * * *."
(Petition page 6).

2. "* * * it is necessarily an ambiguous term; and it made the contract ambiguous when or where it was employed." (See Petition page 10)

3. Authorities cited, Petition pages 10, 11 and 12.

B. THE FINDING OF THE COURT OF APPEALS THAT THE CONTRACT WAS NOT AMBIGUOUS DOES NOT CONFLICT WITH ANY ARKANSAS LAW OR DECISION.

1. *General Rule.* All agree that where a written contract is free from ambiguity, the construction and legal effect present a question of law for the Court. But, before any jury question can arise some agency must first determine whether or not there is an ambiguity in the contract. Who can make this determination?

2. *Whether a contract is ambiguous or not is a question of law for the court.* The rule stated in 17 C. J. S. 1287, Contracts, Section 617, seems to be universal that

> "The question of whether an ambiguity exists is to be determined by the court as a question of law."

The Arkansas courts uniformly follow this rule.

Yale Automobile Co. v. *Walker,* 145 Ark. 344, 224 S. W. 632; *Lindner* v. *Mid-Continent Petroleum Corp.,* 221 Ark. 241, 252 S. W. 2d 631.

It follows that the Court of Appeals was proceeding strictly in accordance with Arkansas law, when it made the determination of whether the contract was, or was not, ambiguous.

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4. "Petitioner does not question * * * that a contract, when free from ambiguity, presents no jury question." (Petition page 7)

3. *The Court of Appeals found the contract was not ambiguous.* The Court of Appeals made the necessary preliminary determinaton. It found that the original September contract was not ambiguous.[5]

4. *The suggested conflict with Arkansas law is not shown by the record.* Petitioner presents a plethora of citations (Petition pages 10 to 12) to establish that a jury question arises *when* the court has made the preliminary finding that the contract *is* ambiguous. He cites no Arkansas decision holding that this particular contract is ambiguous. Page after page is devoted to support petitioner's view that the original September contract contained an ambiguity. This is submitted solely on the basis of his argument, and not with reference to any Arkansas law. If there were an ambiguity in the contract, then the finding of the Court of Appeals to the contrary would have been erroneous. In no event would it conflict with any Arkansas rule of law or decision of the Arkansas Supreme Court.

C. CONCLUSION. Under Arkansas law, whether a written contract is ambiguous is a preliminary question to be decided by the court; unless an ambiguity is found, the construction of the contract is a matter of law for the court. The Court of Appeals found there was no ambiguity in the original September contract. Petitioner disagrees only with this finding. He does not dispute that the court was

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5. **Opinion below 248 F. 2d 896 Loc. Cit. from page 31 of Appendix to Petition for Certiorari**
"The contract here was deliberately entered into, the language used is clear and its meaning can easily be determined from a consideration of the simple and harmonious facts with which it deals."

the proper agency to make the finding. He does not contend that the finding so made conflicts with any decision of any Arkansas court. Whether that finding is right or wrong affects only the parties to this action. It is a matter of purely private concern. No fact or circumstance within the purview of Rule 19 is presented. We have no conflict with any state law.

II. The question presented for certiorari is moot.

A. THE QUESTION PRESENTED. Petitioner presents only the question whether the Court of Appeals was correct in holding that the contract between the parties was unambigiuous.[6]

B. STATEMENT OF THE ISSUES.

1. *Petitioner's Contention.* Petitioner contends (Petition 20) that

> "The basic question in the case is the scope of the obligation that Withrow undertook by his contract to furnish the Section M items."

It is additionally asserted (Petition 19) that if Withrow was not required to furnish the window sills under the original September contract

> "* * * * then the entire decision of the Court of Appeals must fall."

---

6. **Question submitted. (Petition page 2)**
"Was the Court of Appeals for the Eighth Circuit correct in declaring that the contract between the parties contained no ambiguous terms and presented no question of fact?"

2. *Respondents' Contention.* The Court of Appeals discussed two independent issues. It found and held:

(a) The original September contract was not ambiguous and required Withrow to furnish the sills.

(b) The subsequent July agreement was not void for duress and constituted a complete bar to any recovery under the original September contract.

Respondents therefore contend that, if the July agreement was a complete bar to any recovery under the original September contract, then the scope of Withrow's obligations under the original September contract, is of academic interest only; whether it was or was not, ambiguous; whether it did, or did not require Withrow to furnish the sills, is quite immaterial. The judgment of the Court of Appeals would not be affected by any ruling on the question submitted.

C. THE TRIAL ISSUES.

1. *The Pleadings.* The action was to recover for window sills as extras to a written contract. Answer: Sills were not extras, but whether they were or were not extras under the original September contract, the parties had already settled that dispute by an unambiguous July agreement that Withrow would furnish the sills under the contract and not as extras. Reply: July agreement was obtained through duress.

2. *Sequence of Determination of Issues.* From a chronological viewpoint, one might defer consideration of the July agreement until after determining whether the

original September contract required Withrow to install the sills. On the basis of logic and legal reasoning, however, it would seem preferable first to consider whether Withrow is barred by the July agreement. If so, we would never get to consider the original September contract at all. Under old time practice, a plaintiff, confronted with such a plea in bar, would perhaps have been obliged first to sue in equity to set aside the July agreement, before a court of law would even permit him to maintain an action on the original September agreement. For practical purposes, unless the July agreement is set aside for duress, the dispute about the original September contract would seem to be pointless. We shall, therefore, first discuss Withrow's attempt to avoid the July settlement.

3. *The Duress Issue.* The only ground on which Withrow attempted to avoid the July agreement, was that this agreement was obtained through economic coercion and duress. The only threats complained of were in writing in the correspondence between the parties (R. pages 48 to 66 inclusive). The only suggestion that these threats resulted in coercion was the undisputed testimony of Mr. Withrow, the petitioner's president. Where the facts are undisputed and uncontradicted, whether such threats are sufficient to constitute duress, is a question of law for the court. *Winget* v. *Rockwood,* 5th Circuit, 69 F. 2d 326, 330, *Bennett* v. *Mahon,* 8th Circuit, 180 F. 2d 224, 227.

D. THE JULY AGREEMENT ELIMINATES ANY NECESSITY FOR CONSIDERING ALLEGED AMBIGUITIES IN ORIGINAL SEPTEMBER CONTRACT.

1. *Determination of the Duress Issue.* After a clear and elaborate analysis of both facts and law the Court of Appeals concluded its findings on the subject of duress in the following language: (emphasis supplied)

> "On consideration of the whole record, our conclusion is that no facts were present, sufficient to support a finding of duress practiced upon Withrow in the making of his agreement to furnish the sills under his contract, and not as extras, and that his agreement made subsequently to the original sub-contract considered with his request for and receipt of payment for the items under the contract, *constitutes a complete bar to the relief demanded by him.*" (Opinion 248 F. 2d 896, quoted from pp. 38-9, petition for *certiorari*.)

2. *Consequences of Determination of Duress Issue.* If, as the Court of Appeals held, the July agreement, with performance and payment thereunder, constitutes a complete bar to recovery for the window sills, of what significance is the question whether the original September contract was ambiguous or not? If it was ambiguous, there was a lengthy dispute between the parties and in the correspondence above mentioned, each set forth his own views. Without fraud, mistake or duress, that dispute was settled by a new, clear and unambiguous agreement under which Withrow was allowed to proceed. No question is submitted to this Court concerning the duress issue, and yet, the determination of that issue, whether right or wrong, settled the whole case. The July agreement, not being void for

duress, constituted a bar to any recovery. True, the Court of Appeals carefully and painstakingly considered and quoted the original sub-contract. It convincingly demonstrated that from the very first Withrow had been obligated to install the window sills, and that there was nothing ambiguous about the original September contract whereby Withrow undertook this obligation. If this part of the opinion—if the entire discussion of the Court of Appeals concerning the terms of the original September contract—should be treated as *obiter dictum*, it would not follow that the judgment of the Court of Appeals should be reversed. Withrow was still barred by the July agreement regardless of any ambiguities in the original contract. When the determination of the only question submitted for *certiorari* would be without legal significance or effect, the question will be deemed moot and *certiorari* denied.

III. The Original September Contract was not Ambiguous and it did Require Withrow to Install the Window Sills.

A. SCOPE AND PURPOSE. We believe we have already demonstrated that the consideration of this proposition is academic only. Regardless of the technical insufficiency of the petition for *certiorari* in submitting only a question without legal consequence, we propose to answer petitioner's contentions on the merits. Without benefit of any separate or specific statement by petitioner we can, we believe, summarize all of his contentions under three principal points, as follows:

PETITIONER'S CONTENTIONS

1. The original contract was ambiguous because of the use of the word "sill."

2. The Seventh Floor contract shows the parties construed the original September contract as not including window sills.

3. The Court of Appeals decided the case on a point not briefed or argued.

We shall answer these contentions in the order stated.

B. THERE WAS NO AMBIGUITY, LATENT OR PATENT IN THE ORIGINAL SEPTEMBER CONTRACT.

1. *Reference.* This answers the arguments on pages 7 to 12 and 17 to 18 of the petition for *certiorari*.

2. *The Terms of the Original September Contract.* Withrow agreed (R. 9, 10) to furnish all materials, tools, equipment and labor and perform all operations

> "• • • in connection with the installation of aluminum windows • • • in strict accordance with specifications Section M-1 through M-5 and applicable drawings • • •."[7]

---

7. Original sub-contract (R. 9 and 11) reads in part:
"That the Sub-contractor will furnish all materials, tools, equipment and labor necessary to fully perform all of the above set forth portion or subdivision of the contract between the Owner and the Contractor in accordance with the Plans and Specifications pertaining to the above portion or subdivision of the work to be done."

The "above portion or subdivision" of the work is described as follows:
"For furnishing all plant, labor, equipment, appliances and materials, and performing all operations in connection with the installation of Aluminum Windows, Aluminum Screens, Aluminum Panels, Aluminum Louvres, Aluminum Door Frames, in strict accordance with the specifications, Section M-1 thru M-5, applicable drawings, Addenda No. 1, 2, 3 and 4, and subject to the terms of the contract."

3. *Specifications Sections M-1 through M-5.* For the convenience of the Court we quote from Specifications Section M-1 through M-5 (R. 33 to 38 inclusive) in skeleton form. The emphasis is ours:

"1. *Scope.* The work covered by this section of the specifications consists of furnishing *all* plant, labor, equipment, appliances *and materials, and in performing all operations in connection with the installation of aluminum windows, complete,* in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract."

"2. *General.* All metal windows and equipment shall be * * * of the designed types indicated on the drawings * * * the windows shall be *furnished and erected complete* * * * with all necessary attachments * * * neessary and required for complete installation * * * each window shall be securely and permanently anchored in place to the building construction * * * *the entire installation shall be made weather tight and water tight,* and the contractor and manufacturer of windows shall assume *full responsibility for this requirement.*"

* * * * * * * *

5. *Material.* (a) windows, vents, window frames, screen frames, sills, stools * * * shall be extruded aluminum * * *.

"Interior stools where required, shall be not less than 3/32" thick, extruded aluminum of one (1) piece without joints. Maximum length required is 27'-1".

"Exterior subsills where required, shall be not less than 1/8" thick extruded aluminum. Lengths shall be of the longest practical sections with butt flush fastening from below."

4. *The Applicable Drawings.* There was no dispute that defendant's Exhibit No. 1 (R. 81) was the applicable drawing. It bears the title "window details." Immediately below the encircled figure 9 the Court will find the applicable drawing for the exterior aluminum sill and immediately to the left thereof the interior sill together with the anchor clip. This was used by the plaintiff in his shop drawings (plaintiff's Exhibit 22, R. 153). In the lower left hand corner the Court will find the original applicable drawing reproduced together with the notations by Withrow that the sills therein shown would not be furnished by him.

5. *Alleged Ambiguity.* The only ambiguity alleged to be in the contract itself is that assumed to result from the use of the word "sill" which is said to be a word of ambiguous meaning.

6. *Conclusion as to Contract.* Regardless of alleged distinctions between a "window sill" and the "sill of a window," it would seem clear that there is no ambiguity in the contract to perform all operations required under Section M.

Withrow undertook to perform all of these operations "in connection with the *installation* of the windows, *complete* • • •". He expressly agreed that each window would be permanently anchored in place (Section 2) and that the installation would be weather tight and water tight. It is admitted that the exterior and interior sills were shown on the applicable drawings. It could hardly be contended that a window *installation* is "complete" without window sills. In no event would the installation be

weather tight and water tight without the window sills, and finally, by what reasoning could one explain the specifications of the particular material, of a specified kind and thickness, for the particular interior and exterior window sills, as required by paragraph 5 of Section M, unless Section M did require the installation of such window sills? In the face of such clear, definite and conclusive specifications, no claim that an ambiguity resulted from some strained meaning of the word "sills" is very impressive.

C. THERE WAS NO AMBIGUITY FROM EXTRANEOUS MATTERS. In these circumstances we can understand why petitioner has not relied very heavily on the fragile contention that there was anything ambiguous in his subcontract to furnish and do everything required by the specifications of Section M. On the contrary, petitioner attempts largely to inject ambiguity into his contract by extraneous circumstances. He introduced Section J of the contract, which is not involved in his subcontract at all, and chief among the extraneous circumstances is his argument based on the 7th floor contract, which we will now consider.

D. THE 7TH FLOOR CONTRACT.

1. *Reference—Petition for Certiorari, Pages* 12 *to* 15.

2. *Respondents' Contention.* Both the original September contract (R. 9) and the 7th floor contract (R. 13) required Withrow to install the windows "complete," in accordance with Specifications M-1 to M-5 and the *applicable drawings.* As to the original September contract we have already seen that the applicable drawings showed the

sills in controversy. As to the 7th Floor contract, it is to be noted that under the change order Grimshaw was required only "to construct in part a seventh floor" (plaintiff's Exhibit 17, R. 129); this was to be only the "shell" of a building (R. 132); and the architect testified without contradiction (R. 132-133)

> "• • • under Section M-1 there was no requirement that interior sills would be furnished on the 7th floor *because there would be no applicable drawing.*" (Emphasis supplied.)

3. *Conclusion as to 7th floor argument.* We therefore agree with petitioner that Grimshaw demanded (Petition 14)

> "that Winthrow furnish more under the first contract than • • • was due under the second contract."

Both sections required the installation of the windows in accordance with the applicable drawings. The applicable drawings for the first contract required installation of the window sills. There were no applicable drawings showing window sills under the 7th floor contract. It is difficult to comprehend in what respect *either* contract was at all ambiguous in this respect, or to find any inconsistency in Grimshaw's demands under the separate contracts.

E. PETITIONER WAS NOT DENIED HIS DAY IN COURT.

1. *Reference.* This answers pages 5 and 6 and the last paragraph on page 18 in the petition for *certiorari*, all to the effect that in considering the original September contract, the Court of Appeals decided the case on an issue not briefed or argued; that the record is inadequate on this *point, and that petitioner* has never had a day in court to be heard on this issue.

2. *Nature of Proof.* Obviously these contentions are not to be answered by reference to the record of the case used by the Court of Appeals. Whether the question was briefed and argued can appear only by reference to the briefs of the parties and to orders made by the Court of Appeals during the course of the oral argument. We have therefore added as Appendices 3 to 11 quotations from the briefs of the parties under which the case was submitted to the Court of Appeals, together with copies of the orders of that Court, and quotations from the petition for rehearing in the court below.

3. *The Question Whether the Original September Contract was Ambiguous was Briefed and Orally Argued.* As suggested above, the obligations of the original September contract were without significance at the time when Withrow first commenced the installation of the windows. By the July agreement he had specifically undertaken to install the window sills. So long as that agreement remained, it constituted a complete bar to any controversy about the obligations of the original September contract. In answer to Grimshaw's brief to the effect that the July agreement rendered unnecessary any discussion of the original September contract, and that the July agreement was not void for duress, Withrow injected the contention that the original September contract did not require him to furnish the window sills. The argument that the word "sill" is of ambiguous meaning was duly presented (Appendix 3). The predicate for the 7th floor argument was

originally made on pages 5 to 6 of Withrow's brief (Appendix 4). The same 7th floor argument was made (Appendix 5) and it was fully developed on pages 16 to 18 of his brief (Appendix 6) and even the conclusion contained the argument that Withrow was under no obligation to furnish the sills (Appendix 7).

Much of the foregoing argument was presented as showing that Grimshaw could not have been in good faith in the dispute over the meaning of the contract. In answer to this attack upon his good faith, Grimshaw, in his reply brief, pointed out that the requirements of the original September contract had no legal significance (Appendix 8), but nevertheless Grimshaw presented, in detail the exact and actual contract obligations of the parties under the original September contract, and also answered all of the extraneous circumstances suggested by Withrow in his attempt to show that the contract was ambiguous.

4. *Court of Appeals' Orders.* Oral argument had been set in this case before the time had expired within which Grimshaw was allowed to file a reply brief. At the oral argument the Court of Appeals enlarged the time within which Grimshaw could have the reply brief printed and filed. Court and counsel for both sides all agreed that to conduct the oral argument before Grimshaw's reply brief was filed could possibly operate to the prejudice of Withrow in depriving him of the opportunity, in the oral argument, to answer everything in the reply brief. To preclude any possible claim of prejudice, the Court duly entered its order giving Withrow leave to answer "if new questions are raised in the reply brief." (Appendix 1.)

5. *Proceedings after Oral Argument.* Grimshaw and his surety duly filed their reply brief. As in the oral argument, the reply brief duly considered Withrow's obligation under the original September contract. Withrow made no complaint, filed no application to supplement the record on which the case was submitted, and filed no supplemental brief of any kind. In due time the Court of Appeals rendered its judgment and shortly thereafter Withrow filed his petition for rehearing. In that petition for rehearing Withrow made the identical contention now submitted to this Court, that Withrow had

> "not been given an opportunity to be heard on the issue which this court has now made the basis for its decision." (Appendix 9.)

Again contention was made that the word "sill" is ambiguous (Appendix 10) and the 7th floor argument was again made (Appendix 11) in language almost verbatim with that employed in this Court.

6. *Conclusion.* Petitioner himself injected the issue of the meaning of the original September contract in his answer brief. The matter was completely argued in the oral argument before the Court of Appeals. Indeed counsel may well remember that his major point was there christened "the seventh floor argument." The reply brief presented the issue in detail. Ample opportunity was allowed to petitioner to supplement the record and to file a supplemental brief before the Court of Appeals in event he was so advised. With his memory thus refreshed, counsel may perhaps recall there was nothing in the Grimshaw reply brief that had not been included in the oral argu-

ment, and there is nothing in the opinion of the Court of Appeals that was not fully presented both in the oral arguments and in the reply brief. The precise point was submitted to the Court of Appeals in the petition for rehearing. In these circumstances we are unable to concur with counsel in his contention that the part of the decision holding that the contract was not ambiguous, was not adequately briefed, or was not submitted to the Court of Appeals for its decision. Having the opportunity to supplement the record and the right to file a supplemental brief to controvert Grimshaw's reply brief, and having declined to take advantage of this right, Withrow clearly waived any right to contend, at *this* time, that he was denied any opportunity to be heard on the issue of the meaning of the original September contract.

CONCLUSION

The question presented is not within the purview of Rule 19 and is moot. There was no ambiguity in the contract nor was petitioner denied his day in court. If petitioner felt that the ambiguity issue was not adequately argued or presented, he had express leave to file a supplemental answer brief, and waived this right.

For the foregoing reasons the petition for writ of *certiorari* should be denied.

Respectfully submitted,

REMINGTON ROGERS,
409 Oil Capital Building,
Tulsa 3, Oklahoma,
Attorney for Respondents.

APPENDIX.

Appendix No. 1.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

September Term, 1956.

Friday, September 6, 1957.

Appeal from the United States District Court for the Eastern District of Arkansas.

No. 15,768.

W. R. GRIMSHAW COMPANY, et al., Appellants,

vs.

NEVIL C. WITHROW CO., Inc.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Remington Rogers for appellants, continued by Mr. Cooper Jacoway for appellee, and concluded by Mr. Remington Rogers for appellants.

Thereupon, this cause was submitted to the Court on the printed record and briefs of counsel filed herein, with leave to appellants to file Reply Brief within ten days and to counsel for appellee to file answer thereto if new questions are raised in the reply brief.

Appendix No. 2.

United States Court of Appeals
for the Eighth Circuit.

E. E. Koch, Clerk. St. Louis, Missouri,
November 15, 1957.

15768. W. R. Grimshaw Co., et al., v. Nevil C. Withrow Company, Inc.

Messrs. Rogers & Brightmire,
409 Oil Capital Bldg., Tulsa, Oklahoma.

Dear Sirs: An Order of this Court has today been entered denying the petition of the appellee for a rehearing in the above case.

Very truly yours,
Eugene C. Fisher, Acting Clerk.

cc:Mr. A. L. Barber,
Little Rock, Arkansas.

Appendix No. 3.

"The sill of a window is a technical term. It refers generally to the top or bottom member of a window. The narrow shelflike surface found at the bottom of the window opening and projecting into the room at right angles to the window opening and covering the material in which the window opening is made, is what laymen call a window sill; but in the building trades it is called a stool or apron when it is on the inside of a room and a subsill when it is on the outside of the window opening. It is especially important to remember in this case the difference in meanings of the term sill when in connection with windows." (Withrow brief, pages 4-5.)

Appendix No. 4.

"Grimshaw then entered into a supplementary contract with the Withrow Company whereby • • • Withrow agreed to furnish for the seventh floor exactly what he had agreed to furnish for the rest of the building (R. 13-15)." (Withrow brief, pages 5-6.)

Appendix No. 5.

"It is most significant to know that the second contract between the University of Arkansas and the Grimshaw Company relating to the seventh floor required the Grimshaw Company to furnish the windows and meet the requirements of Section M, but that contract did not require the Grimshaw Company to furnish the items covered in Section J and Grimshaw did not furnish the window sills for seventh floor. In connecton with the seventh floor, Withrow furnished only the windows, as required by Section M and did not furnish the window sills, although the Grimshaw Company had compelled Withrow to furnish the window sills claiming they were a part of Section M in connection with the other six floors." (Withrow's brief, page 9.)

Appendix No. 6.

"Briefly: Under the first contract between the Grimshaw Company and the Board of Trustees, the Grimshaw Company undertook to construct a six-story Medical Center and to furnish in connection with it items described in Sections M and J of the Specifications. Later the Grimshaw Company was given a separate contract in which it undertook

to construct a seventh floor to the Medical Center building and undertook to furnish in connection with that seventh floor only those items described in Section M. It subcontracted with Withrow as to all seven floors that Withrow should furnish only the Section M items. When Grimshaw completed the seventh floor, it did not furnish window sills. The Grimshaw Company, in failing to furnish window sills for the seventh floor, necessarily recognized that window sills were not included in the requirements under Section M." (Withrow brief, pages 17-18.)

Appendix No. 7.

"Grimshaw wrongfully demanded that Withrow furnish the window sills when in truth and in fact Withrow was not under obligation to furnish those sills." (Withrow brief, page 33.)

Appendix No. 8.

"a. *Preliminary Statement.* In our original brief, we devoted no time to prove that the original subcontracts required Withrow to furnish the sills. It was then, and is now, our position that since *the sills were furnished by Withrow, in accordance with his letter of July 2, 1953, and Grimshaw's acceptance thereof,* it was quite unnecessary to consider whether the *original* subcontract did or did not include the sills. Since the good faith and sincerity of Grimshaw is attacked on this ground, it now becomes necessary to inquire whether, under the subcontracts *as written,* Mr. Grimshaw was justified in the position taken." (Reply brief, pages 4-5.)

This was followed by appropriate arguments under subheads

"b. *Withrow's duty under Section M"* (Reply brief, page 5).

"c. *The applicable drawings required Withrow to install the Window Sills"* (Reply Brief, page 6).

"3. *Neither Section J, nor Withrow's separate bid thereon eliminated the sills from Withrow's contract."* (Reply Brief, page 8.)

"4. *The 7th floor argument shows no bad faith on Grimshaw's part."* (Reply Brief, page 9.)

Appendix No. 9.

"The Grimshaw Company did not, we respectfully submit, at any point, brief or argue that the trial court erred, in submitting to the jury the question as to whether the subcontract required the Withrow Company to furnish the window sills. When the matter was orally argued, the Court directed no questions to Counsel on that issue of the scope of the contract. * * * Frankly, Appellee feels that it has not been given an opportunity to be heard on the issue which this Court has now made the basis for its decision. * * * Appellee requests therefore that it at least be given an opportunity to submit a supplemental record that will fairly present to this Court the testimony and the exhibits presented to the trial court in connection with this issue." (Petition for Rehearing, pages 3 and 4.)

Appendix No. 10.

"In this case the meaning of the term sills was not clear. It could have referred either to the window sill or to the sill of the window (which is the bottom member of the window frame)." (Petition for Rehearing, page 7.)

Appendix No. 11.

Except for necessary changes on account of the Court being addressed, paragraphs on pages 9 to 11 of the Petition for Rehearing are verbatim with the paragraphs in the Petition for Certiorari beginning at the bottom of page 12 and extending through the second paragraph on page 15.